



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 49 and 52

[EPA-R10-OAR-2017-0347; FRL-9996-67-Region 10]

#### **Indian Country: Air Quality Planning and Management; Federal Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington; Redesignation to a PSD Class I Area**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Environmental Protection Agency (EPA) is approving the May 11, 2017 proposal by the Kalispel Indian Community of the Kalispel Reservation (herein referred to as the Kalispel Tribe of Indians or Kalispel Tribe) to redesignate lands within the exterior boundaries of the Kalispel Indian Reservation located in the State of Washington to Class I under the Clean Air Act (Act or CAA) program for the prevention of significant deterioration (PSD) of air quality. Redesignation to Class I will result in lowering the allowable increases in ambient concentrations of particulate matter (PM), sulfur dioxide (SO<sub>2</sub>), and nitrogen oxides (NO<sub>x</sub>) on the Kalispel Indian Reservation. Concurrently, the EPA is codifying the redesignation through a revision to the Federal Implementation Plan (FIP) currently in place for the Kalispel Indian Reservation. This FIP will be implemented by the EPA unless or until it is replaced by a Tribal Implementation Plan (TIP).

**DATES:** This final rule is effective on **[Insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R10-OAR-2017-0347. All documents in the docket are listed on the <https://www.regulations.gov> web

site.

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**SUPPLEMENTARY INFORMATION:** Throughout this document, wherever “we,” “us,” or “our” is used, it is intended to refer to the EPA.

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### **I. Background**

Title 1, part C of the CAA contains the PSD program. The intent of this part is to prevent deterioration of existing air quality in areas having relatively clean air, i.e. areas meeting the National Ambient Air Quality Standards (NAAQS). The Act provides for three classifications applicable to all lands of the United States: Class I, Class II, and Class III. Associated with each classification are increments which represent the increase in air pollutant concentrations that would be considered significant. PSD Class I allows the least amount of deterioration of existing air quality. PSD Class II allows a moderate amount of deterioration, while PSD Class III allows the greatest amount of deterioration. Under the 1977 Amendments to the Clean Air Act, all areas of the country that met the NAAQS were initially designated as Class II, except for certain international parks, wilderness areas, national memorial parks and national parks, which were designated as Class I along with any other areas previously designated Class I. The Act allows states and Indian governing bodies to redesignate areas under their jurisdiction to PSD Class I or

PSD Class III “to accommodate the social, economic, and environmental needs and desires of the local population.” *Arizona v. EPA*, 151 F.3d 1205, 1208 (9th Cir. 1998).

On May 11, 2017, the Kalispel Tribe submitted to the EPA an official proposal to redesignate the original Kalispel Reservation from Class II to Class I. The original Kalispel Reservation was established by Executive Order No. 1904, signed by President Woodrow Wilson on March 23, 1914. A copy of this Executive Order is included in the docket for this action. The Kalispel Tribe submitted a supplement to the official proposal on July 13, 2017. The Kalispel Reservation is located in the State of Washington. The Kalispel Tribe’s proposal and supplement included an analysis of the impacts of the redesignation within and outside of the proposed Class I area, documentation of the delivery and publication of appropriate notices, a record of the public hearing held on April 10, 2017, and comments received by the Kalispel Tribe on the proposed redesignation. EPA proposed to approve the Kalispel Tribe’s proposal to redesignate the original Kalispel Reservation to a Class I area on October 31, 2018. (83 FR 54691). An explanation of the requirements for a redesignation and how the Kalispel Tribe complied with those requirements was provided in the notice of proposed rulemaking and will not be restated here.

The public comment period for this proposed action was open October 31, 2019 through December 14, 2018 and reopened February 5, 2019 through February 20, 2019. EPA held a public hearing on the proposed action on December 6, 2018 in Newport, Washington. During this hearing, 16 members of the public provided verbal comments. Of the 16 verbal commenters, 15 supported EPA’s proposed approval of the Kalispel Tribe’s redesignation, while one commenter expressed interest in establishing air quality monitoring stations in Pend Oreille County. This

comment was determined to be unrelated to this action and no further discussion is provided below. Documentation of these comments is included in the docket for this action.

## **II. Response to Comments**

EPA received comments from 164 parties on the proposed approval of the Kalispel Tribe redesignation request. Of the 164, 137 commenters supported EPA's proposed action, while 17 opposed EPA's proposed action. The remaining ten comments were either unrelated to EPA's proposed approval of the Kalispel Tribe's redesignation request or did not recommend EPA take a position on the redesignation request. In particular, several commenters expressed opposition to the proposed construction of a silicon smelter in Newport, Washington. However, the potential silicon smelter is unrelated to EPA's proposed approval of the Kalispel Tribe's redesignation request. In addition, one commenter provided information on the air quality monitoring needs in Pend Oreille County, but did not connect this information with EPA's proposed approval of the Kalispel Tribe's request. EPA has considered all the relevant comments received. Within this section, we have summarized the adverse comments and provided our responses. A full copy of comments received is available in the docket for this final action.

### *A. Economic Impacts of Redesignation*

Several commenters argued that EPA should deny the Kalispel Tribe's proposal because redesignating the Kalispel Tribe's original reservation to Class I under the CAA PSD program would hinder economic development in the area. As stated in the proposal, the CAA establishes a narrow role for EPA in reviewing a state or tribe's proposal to redesignate certain areas as either Class I or Class III. Section 164(b)(2) of the CAA states, "The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of [Section 164 of the CAA] or is

inconsistent with the requirements of [Section 162(a) of the CAA] (listing mandatory Class I areas).”

Similarly, the United States Court of Appeals for the Ninth Circuit recognized that when Congress amended Section 164 of the CAA in 1977, Congress intended to “eliminat[e] the authority which EPA had to override a local government’s classification of any area on the ground that the local government improperly weighed energy, environment, and other factors.” *Arizona*, 151 F.3d at 1211 (citing H.R. Rep. No. 95-294, at 7-8). The Ninth Circuit also made clear that once the procedural requirements of Section 164 of the CAA and 40 CFR 52.21 are met, the EPA must approve the request for redesignation. *Id.* at 1208, 1211. The Seventh Circuit has similarly acknowledged that EPA has “little discretion” when reviewing redesignation requests, provided the procedural requirements have been met. *Michigan v. EPA*, 581 F.3d 524, 526 (7th Cir. 2009) (citing *Arizona*, 151 F.3d at 1208).

Therefore, as described in the statutory text, EPA’s role in acting on a state or tribe’s proposal is to determine whether the procedural requirements in Section 164 of the CAA and implementing regulations at 40 CFR 52.21(g) have been met, not to assess the prudence of a state or tribe’s proposal based on economic considerations or other factors. Moreover, neither the CAA, nor 40 CFR 52.21(g) require a state or tribe requesting redesignation to demonstrate that the redesignation will have no adverse economic, social, or energy effects. As stated in the proposal, EPA found no procedural defects in the Kalispel Tribe’s proposed redesignation. Therefore, consistent with the constraints of Section 164 of the CAA and 40 CFR 52.21(g), EPA has determined that approval of the redesignation is appropriate.

*B. Consultation with elected leadership of local and other substate governments in the area covered by the proposed redesignation*

Several commenters argued that the regulations governing the process for seeking redesignation mandated that the Kalispel Tribe consult with county-level governments surrounding or near the Kalispel Reservation. The regulation at 40 CFR 52.21(g)(2)(v) provides that “the State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.” The regulation at 40 CFR 52.21(g)(4)(i) provides that lands within the exterior boundaries of Indian Reservations may be redesignated if the Indian Governing Body has followed procedures equivalent to those required of a State under 40 CFR 52.21(g)(2).

The Kalispel Tribe’s proposal makes clear that the area covered by the proposed redesignation is the original reservation established by Executive Order No. 1904, signed by President Woodrow Wilson on March 23, 1914. The Kalispel Business Council is the exclusive governing authority in the Kalispel Reservation. Therefore, the Kalispel Tribe satisfied this requirement. The area “covered” by the redesignation is separate and distinct from the areas that may be “affected” by the redesignation. Importantly, the consultation requirement in 40 CFR 52.21(g)(2)(v) is limited only to the areas “covered” by the redesignation and does not extend to the areas potentially “affected” by the redesignation. As stated in the proposal, there is no consultation requirement for areas that may be affected by the proposed redesignation. By extension, the Kalispel Tribe was not required to consult with county-level governments in Washington or Idaho prior to proposing the redesignation. EPA’s evaluation of the Kalispel Tribe’s compliance with the procedural requirements at 40 CFR 52.21(g)(2)(v) and 40 CFR 52.21(g)(4)(i) is consistent with the regulatory text.

One commenter stated that because the Kalispel Reservation is located within Pend Oreille County, Pend Oreille County constitutes a local or substate government in the Kalispel

Reservation as contemplated by 40 CFR 52.21(g)(2)(v) and 40 CFR 52.21(g)(4)(i). The commenter further stated that EPA's interpretation of 40 CFR 52.21(g)(2)(v), as described in the proposal, undercuts its purpose.

We decline to accept the commenter's interpretation of 40 CFR 52.21(g)(2)(v) to require tribes to consult with substate governments whose boundaries encompass an Indian Reservation. If there existed municipalities or counties within the Kalispel Reservation and the Kalispel Business Council proposed to redesignate lands in those municipalities or counties, then the regulations at 40 CFR 52.21(g)(2)(v) and 40 CFR 52.21(g)(4)(i) would require the Kalispel Business Council to consult with the elected leadership of those municipalities or counties. Here, the Kalispel Business Council is the only governing body with jurisdiction within the Kalispel Reservation. This constitutes an equivalent requirement as that mandated of a state in 40 CFR 52.21(g)(2)(v). Accordingly, this interpretation maintains fidelity to the plain language and purpose of 40 CFR 52.21(g)(4)(i) and (g)(2)(v) and ensures that local and substate governments in the area covered by the redesignation will be consulted prior to a state or tribe proposing redesignation.

### *C. Inadequate notice*

Three commenters argued that the Kalispel Tribe failed to provide required notice to certain county-level governments potentially impacted by the proposed redesignation. However, EPA does not interpret 40 CFR 52.21(g) or 51.102 as requiring the Kalispel Tribe to provide direct notice of the proposed redesignation to each of these counties individually. As explained in the proposal, and incorporated herein, the Kalispel Tribe satisfied the notification requirements of Section 164 of the CAA and implementing regulations at 40 CFR 52.21(g). The Tribe published a notice of the April 10, 2017, public hearing in the Newport Miner on March 8, 2017,

and again on March 15, 2017, as required by 40 CFR 52.21(g)(2)(i). Also, the Tribe directly notified other states, Indian governing bodies, and federal land managers at least 30 days prior to the public hearing as required by 40 CFR 52.21(g)(2)(ii).

As stated above, the Tribe was not required by Section 164 of the CAA, nor the regulations at 40 CFR 52.21(g), to make a finding on what areas may be affected by the proposed redesignation or provide direct notice to such governments in such areas. Nevertheless, on March 6, 2017, the Tribe sent several Pend Oreille County; City of Newport, Washington; Pend Oreille Public Utility District; and Washington Department of Ecology officials a courtesy notice of the Tribe's intent to propose redesignation, as well as the date, time, and location of the public hearing and the availability of the Kalispel Tribe's February 2017 Class I Redesignation Technical Report ("Technical Report"). Therefore, the Tribe satisfied the notice requirements of the CAA and regulations.

*D. Provide a discussion of the reasons for the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation*

Several commenters argued that the Kalispel Tribe's Technical Report (Document No. EPA-R10-OAR-2017-0347-0013 in the Docket) failed to provide a satisfactory description and analysis of the economic, social, and energy effects of the proposed redesignation, as required by 40 CFR 52.21(g)(2)(iii). In particular, several commenters stated that the economic analysis provided in the Technical Report inappropriately included data from Spokane County and Stevens County. The commenters argued that the economic situation of Pend Oreille County exclusively was more dire than the regional analysis depicted in the Technical Report and that not all workers living in Pend Oreille County can commute to Spokane.



The statute and regulations do not establish a standard for a “satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation....” 42 U.S.C. §7474(b)(1)(A). The Ninth Circuit’s evaluation of a similar criticism of the adequacy of a tribe’s analysis is informative. The court stated, “Congress has established a narrow role for EPA in reviewing State or Tribal requests for redesignation” and that “Congress limited EPA’s authority to disapprove redesignation requests to a procedural level.” *Arizona*, 151 F.3d at 1211. Reviewing a challenge to a redesignation, which included the question of whether the Tribe’s analysis was “satisfactory,” the Court found that EPA “reasonabl[y] interpret[ed]” the statutory requirements when the agency concluded that a “‘satisfactory description and analysis’ is a relatively low threshold.” *Id.*

The court also explained that the CAA “does not assign any weight to these individual effects and does not suggest that one effect should be given priority over another” and that Congress did not intend for EPA to “re-weigh[] the effects of a proposed redesignation or second-guess[] a Tribe’s decision to redesignate its reservation lands.” *Arizona*, 151 F.3d at 1211-12. Our review of the Technical Report was informed, in part, by the Ninth Circuit’s analysis of Section 164(b)(1)(A) of the CAA and we concluded that the analysis was satisfactory. Further, as detailed below, the commenters did not provide information that called into question the factual foundation of the Technical Report.

Specifically, our review of the Technical Report indicated that the Tribe’s analysis of the economic impacts of redesignation on Pend Oreille, Stevens, and Spokane Counties was reasonable. In particular, the Technical Report includes a supplemental report as Appendix B entitled “The Economic Impact of Redesignation of the Kalispel Indian Reservation as a Class I Area under the Clean Air Act’s Prevention of Significant Deterioration Program.” This report

included a section entitled “Defining the Economic Area in Which the Kalispel Tribe is Embedded,” which explains the Tribe’s rationale for defining the Kalispel Reservation Economic Area.

According to this section, the economic analysis included Spokane County and Stevens County because of the economic connections between Pend Oreille County and Stevens County with Spokane County. Pend Oreille County, Spokane County, and Stevens County are located in the Spokane Metropolitan Statistical Area, which is defined by the U.S. Bureau of Economic Analysis based on measured connections between those counties. The section also included data on commuting patterns that indicated 24% of workers in Pend Oreille County commute to Spokane County for work. Commenters did not provide any data to refute these commuting patterns or the economic connections between the counties. Indeed, the propriety of the Tribe’s inclusion of Stevens County in the analysis is reinforced by the fact that the Stevens County Commissioners commented on EPA’s proposed rulemaking, highlighting the potential economic impacts of redesignation on residents of Stevens County.

The regulation at 40 CFR 52.21(g)(2)(iii) required the Tribe to analyze the economic effects of the proposed redesignation. The regulation does not specify the scope of the analysis. Given the potential for the redesignation to impact pollution sources in Stevens County and Spokane County and the economic linkages between those counties, the Tribe was not unreasonable in analyzing the economic impact of redesignation on all three counties collectively. Moreover, based on the numerous substantive comments the Tribe received regarding the economic situation in Pend Oreille County, the Technical Report appears to have aided the public in providing comments on the Tribe’s proposed redesignation.

In addition to the comments regarding the Tribe's economic impacts analysis, one commenter noted that the Technical Report incorrectly accounts for emissions from Ponderay Newsprint Company's facility located less than two miles south of Usk, Washington and inaccurately suggests that Ponderay Newsprint Company's facility accounts for all PM<sub>10</sub> emissions in the County. However, the Technical Report's description of emissions sources and levels in the area near the Kalispel Reservation is satisfactory.

Specifically, the Technical Report includes a narrative discussion of the sources of emissions in Pend Oreille County and summarized these emissions in Table 13 and Table 14 in the Technical Report. Contrary to the commenter's assertions, the narrative description in the Technical Report makes clear that a sawmill operated by Vaagen Brothers Lumber, Inc. and a locomotive repair facility operated by Pend Oreille Valley Railroad produce particulate emissions in the County, but that information on the precise emissions from these sources was not publicly available. The Tribe also noted in its discussion of emissions sources that the Tribe could not ascertain the status of the air quality permit for Ponderay Newsprint Company's facility. In the alternative, the Tribe obtained emissions estimates for Ponderay Newsprint Company's facility from the Washington Department of Ecology's Title V Program Review Final Report dated September 22, 2014 and provided these estimates in Table 14. Given that the Washington Department of Ecology is the permitting authority for Ponderay Newsprint Company's facility, the Tribe's reliance on these figures is reasonable. The Tribe's decision not to provide an estimate of emissions from other point sources of particulate matter in Table 13 in the absence of a credible source of emissions data was similarly reasonable.

As well as the comments regarding the emissions data presented in the Tribe's Technical Report, three commenters argued that the Technical Report was not satisfactory because it did

not include an analysis of the current consumption of the PSD increment for particulate matter with a diameter less than 10 micrometers (PM<sub>10</sub>). The commenters contend that the absence of this analysis renders the entire Technical Report materially deficient. We disagree. As stated above, the Kalispel Tribe was required to provide the public, at least 30 days in advance of the public meeting, a discussion of the reasons for the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation. The Kalispel Tribe did so. The Kalispel Tribe provided the Technical Report over 30 days in advance of the April 10, 2017, public hearing. As discussed in the proposal, EPA assessed the report and determined that it contains a thorough description of the health, environmental, economic, social, and energy effects of the proposed redesignation.

EPA's assessment is consistent with the limited role assigned to EPA in this endeavor. The Ninth Circuit has recognized that "Congress has established a narrow role for EPA in reviewing State or Tribal requests for redesignation" and that "Congress limited EPA's authority to disapprove redesignation requests to a procedural level." *Arizona v. EPA*, 151 F.3d at 1211. Reviewing a challenge to a redesignation, which included the question of whether the Tribe's analysis was "satisfactory," the Court found that EPA "reasonabl[y] interpret[ed]" the statutory requirements when the agency concluded that a "'satisfactory description and analysis' is a relatively low threshold." *Id.* Consistent with that direction, given the thorough description and analysis included in the report, it is reasonable for us to conclude that the Kalispel Tribe has cleared this low threshold. Indeed, the Tribe's Technical Report exceeded the minimum requirements in several respects, as discussed below.

Similar to the commenters here, the petitioners in *Arizona v. EPA* argued that the Yavapai-Apache Tribe's description and analysis of the potential effects of redesignation was inadequate.

*Arizona v. EPA*, 151 F.3d at 1212. The Court noted in *Arizona v. EPA* that the Tribe's report "failed to detail what specific effect, if any, redesignation could have on local sources already in existence . . . ." *Id.* at 1209. The Court nevertheless upheld EPA's approval of the redesignation request on the grounds that the CAA does not mandate a detailed assessment of the impacts of redesignation on existing sources. *Id.* at 1211-12. The Court stated that "it cannot be said that EPA abused its discretion in concluding that the Tribe was not required, as a prerequisite to redesignation, to go further in its Plan by (1) explicitly balancing the different effects of redesignation; (2) identifying air quality related values; (3) evaluating the extent to which Class I status might discourage particular industrial development and expansion; or (4) pointing to off-site sources which might be impacted by the redesignation, including the Phoenix Cement Plant." *Id.* at 1212.

Contrary to the commenters' assertions, the Technical Report at Section 4.1 and Appendix C make clear that the proposed Class I redesignation would reduce the allowable increases above baseline concentration in particulate matter emissions currently allowed under the PSD increment for Class II areas. That is the nature of the Class I PSD redesignation. The commenters are correct that increases in emissions of PM<sub>10</sub> since the minor source baseline date was triggered consume increment, while decreases in emissions make increment available for future consumption. The emissions increases and decreases contributing to increment consumption fluctuate over time. Moreover, increment consumption is both time- and location-specific—two sources can both consume 100% of the increment if their impact occurs at different locations or

different times. An analysis of increment consumption at a fixed point in time, as the commenters request, would not change the overall analysis given these fluctuations.<sup>1</sup>

While determining the current PM<sub>10</sub> increment consumption in the area in and around the Kalispel Reservation would have provided the public with a snap-shot of the current situation, this determination is not an indispensable component of the description and analysis of the potential impacts of redesignation, as the commenter suggests. Given the temporal and spatial nature of the increments, an analysis of potential impacts would need to include numerous assumptions about future emissions changes and the emissions from future projects. EPA does not interpret the requirement of Section 164 of the CAA and 40 CFR 52.21(g) to provide a “satisfactory description and analysis” of potential impacts as requiring such a highly technical and speculative analysis as a prerequisite to obtaining Class I PSD redesignation. As stated above, the Ninth Circuit made clear in *Arizona v. EPA* that Section 164 of the CAA does not require a detailed assessment of the impacts of redesignation on existing sources. *Id.* at 1211-12.

Furthermore, the Tribe did provide an assessment of the impact of redesignation on two hypothetical energy projects sited near the Kalispel Reservation. As part of these assessments, the Kalispel Tribe modeled the PM<sub>2.5</sub>, SO<sub>2</sub>, and NO<sub>x</sub> increment consumption from both hypothetical projects. The assessments modeled consumption of PM<sub>2.5</sub> increments which are lower than the corresponding PM<sub>10</sub> increments as a conservative worst-case scenario. The Kalispel Tribe’s assessments of the two hypothetical scenarios provide a meaningful analysis of

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<sup>1</sup> We also note that if the State or EPA determines that an applicable increment is being violated, then the State or EPA is obligated to promulgate a revised implementation plan to correct the violation. However, neither the CAA nor the implementing regulations prescribe how the regulatory authority must act to reduce emissions or what sources the regulatory authority must control. In addition, interested parties will have an opportunity to comment on any plan revisions the State or EPA proposes to correct the increment violation prior to the revisions taking effect.

the economic and energy impacts of the proposed redesignation that added value to the public hearing process.

Finally, several commenters argued that the Tribe's Technical Report inaccurately determined that the forest products industry was declining in the area surrounding the reservation and that economic growth in the area is more likely to be driven by sectors other than manufacturing. However, these commenters provided minimal empirical data to refute the Tribe's analysis. Therefore, the Tribe was not unreasonable to structure its analysis of the economic and social impacts of the redesignation around the predicted economic makeup of the region surrounding the Kalispel Reservation. The Tribe provided a satisfactory discussion of the reasons for the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation as required by Section 164 of the CAA and 40 CFR 52.21(g)(2)(iii).

*E. EPA should require the Kalispel Tribe to redesignate its entire reservation, not just a portion of the reservation*

One commenter argued that EPA should require the Kalispel Tribe to include its entire reservation in the redesignation proposal, rather than just the original reservation. First, neither the CAA nor the regulations at 40 CFR 52.21(g)(4) prohibit a tribe from proposing redesignation of a portion of its reservation. Section 164(c) of the CAA and 40 CFR 52.21(g)(4) state that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. It is reasonable for EPA to read these sections as not prohibiting a Tribe from proposing to redesignate only a portion of its reservation, as there is no statutory text indicating that if any part of a Tribe's reservation is redesignated then all of the reservation land must be redesignated.

Contrary to the commenter's statements, EPA's approvals of prior redesignation proposals from other Indian governing bodies is consistent with this interpretation. Indeed, EPA approved the Forest County Potowatomi Community's proposal to redesignate only those parcels in the Community's land that equaled or exceeded 80 acres in size. *See*, 73 FR 23086, 23101 (April 29, 2008). The commenter references EPA's action in approving the Yavapai-Apache Tribal Council's proposal to redesignate the Tribe's entire reservation as support that the CAA requires tribes to propose redesignation of their entire reservations, rather than just a portion of their reservations. 61 FR 56450 (Nov. 1, 1996). However, the action cited by the commenter differs materially from the current action regarding the Kalispel Tribe's proposal. Namely, in the action cited by the commenter, the EPA was required to resolve a dispute between the Governor of Arizona and the Yavapai-Apache Tribe under Section 164(e) of the CAA. 61 FR 56450, 56452. When this dispute resolution procedure is invoked, Section 164(e) of the CAA requires EPA to consider the extent to which the lands involved in the redesignation are of sufficient size to allow effective air quality management or have air quality related values of such an area.

Here, no state has requested EPA resolve any dispute under the authority of section 164(e), and authority to invoke dispute resolution is limited to just states and Indian tribes by the statutory text of section 164(e). Therefore, under Section 164(b) of the CAA, EPA lacks authority to consider whether the lands the Kalispel Tribe has proposed for redesignation are of sufficient size. As stated above, the EPA may disapprove the Kalispel Tribe's request only if the Tribe failed to follow the procedural requirements in Section 164 of the CAA and 40 CFR 52.21(g).

#### *F. Regulatory Flexibility Act*

One commenter argued that EPA was required by the Regulatory Flexibility Act (RFA), 5 USC 601-612, to include in the notice of proposed rulemaking an initial regulatory flexibility



analysis. In the notice of proposed rulemaking, the Regional Administrator for EPA Region 10 certified pursuant to Section 605 of the RFA that the proposed rule, if finalized, would not have a significant economic impact on a substantial number of small entities. The commenter argues that the Regional Administrator's certification was improper because approval of the Kalispel Tribe's redesignation proposal impacts small entities located near the reservation.

We disagree. The Regional Administrator's certification was proper because EPA's approval of the redesignation does not impose any direct regulatory burden on any small entities. The Regulatory Flexibility Act imposes no obligation for EPA to conduct a small entity impact analysis of effects on entities which EPA does not regulate. As stated in the proposal, the PSD program already exists on the Reservation and the surrounding area. This action merely approves a Tribe's request to redesignate a portion of its reservation to a Class I area under the PSD program and does not impose any direct regulatory obligations on any sources within or surrounding the Reservation. The State of Washington Department of Ecology administers the PSD Program on the lands surrounding the Kalispel Reservation. While the redesignation may impact the State of Washington's planning and permitting decisions, this indirect impact does not constitute direct regulation of small entities. *See Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000), *see also Am. Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999).

EPA administers the PSD program on the Kalispel Reservation. Even accepting that approving the Kalispel Tribe's proposal constitutes direct regulation of small entities within the Reservation, there are no permitted stationary sources of emissions within the exterior boundaries of the original Kalispel Reservation. Whether any PSD permits or minor source permits will be issued after the redesignation is speculative, so any effect of the redesignation on any EPA permitting decision is similarly speculative. Therefore, there is insufficient information

to conclude that there would be a significant economic impact on a substantial number of small entities located within the Reservation. Accordingly, the Regional Administrator's certification was proper.<sup>2</sup>

#### *G. Other Specific Questions or Comments*

*Summary:* One commenter states that the Clean Air Act did not intend to redesignate areas of land under 5,000 acres.

*Response:* EPA disagrees. In Section 162(a) of the CAA, Congress initially classified certain areas as Class I under the PSD program, and prohibited redesignation of these areas. Specifically, this section states that all international parks, national wilderness areas which exceed 5,000 acres in size, national memorial parks which exceed 5,000 acres in size, and national parks which exceed six thousand acres in size will be classified as Class I. The 5,000-acre threshold is expressly associated with national wilderness areas and national memorial parks and identifies those areas that are mandatory Class I areas that "may not be redesignated." 42 U.S.C. 7472(a). The statutory text does not establish a size limitation for all Class I areas. Lands of the type identified in Section 162(a) of the CAA that are below the associated size limits are Class II areas by default. Section 164 of the CAA explicitly authorizes states and Indian tribes to redesignate areas as Class I and does not prescribe a size. Neither Section 162 nor Section 164 of the CAA restrict a tribe or state from proposing to redesignate portions of a reservation or state land under 5,000 acres.

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<sup>2</sup> We also note that this Final Rule amends the FIP for the Kalispel Indian Community for Kalispel Reservation, Washington, codified at 40 CFR 49.10191-49.10220. On April 8, 2005, EPA promulgated this FIP, as well as FIPs for other federally recognized Indian tribes in Washington, Oregon, and Idaho. These FIPs are collectively called the Federal Air Rules for Reservations ("FARR"). See 40 CFR part 49, subpart M and 70 FR 18074. In that rulemaking EPA certified that the promulgation of the FARR would not have a significant economic impact on a substantial number of small entities. 70 FR 18074, 18091-92. Therefore, the Regional Administrator's certification for today's revision to one of the FIPs in the FARR is consistent with the EPA's prior determinations on the impacts of the FARR on small entities.

*Summary:* One commenter asserts that a fair and open public hearing held by the Kalispel Tribe never occurred due to the hearing examiner instructing a participant to stop speaking, which discouraged other participants from speaking.

*Response:* EPA disagrees. In order to allow all participants an opportunity to speak during a public hearing, it is common and appropriate for a hearing examiner or officer to establish a time limit. EPA reviewed this hearing transcript (Document No. EPA-R10-OAR-2017-0347-0029 in the Docket) and determined that the hearing examiner established a three-minute time limit at the beginning of the hearing and enforced this limit during the hearing. Time-limits can be abrupt in nature, however even with the established time limit, the transcript appears to contain full dialogue from participants. All speakers were subject to the same time limit and members of the public also had the opportunity to submit written comments to the Tribe.

*Summary:* One commenter asks what effect this designation will have on agricultural field, forest slash, and forest health burning in their community.

*Response:* We note at the outset that the commenter does not recommend the EPA take a different action than proposed. Therefore, EPA provides the following response for informational purposes only. Emissions increases from the open burning of agricultural field residues or forest slash, and forest health burning after the minor source baseline date may consume the available PSD increment or may expand the increment if such emissions decrease. However, the emissions from these open burning activities are transitory and occur for short durations and at different locations each year. When such emissions are included in increment consumption calculations, we would expect the consumption at any location from such emissions to be small due to the transitory nature of the emissions. Thus, it is unlikely that the redesignation of the Kalispel

Indian Reservation to PSD Class I will have an impact on current or future open burning activities.

*Summary:* One commenter asserts that Boundary County, Idaho is downwind from the Tribal Reservation and the commenter requests that all lands in Boundary County be excluded from the Class I redesignation.

*Response:* This final action only applies to the area within the external boundaries of the original Kalispel Tribe reservation, as identified in the proposed rule. Boundary County, Idaho will not be redesignated to a Class I area as part of this action.

*Summary:* Numerous commenters expressed support for EPA's proposed approval of the Kalispel Tribe's redesignation request and encouraged EPA to finalize the approval.

*Response:* We have considered these comments, acknowledge the support, and agree that finalizing approval of the Kalispel Tribe's redesignation request is appropriate.

### **III. Final Action**

The EPA's review has not found any procedural deficiencies associated with the Kalispel Tribe's proposal. Accordingly, pursuant to section 164 of the CAA and 40 CFR 52.21(g), the redesignation is hereby approved. The EPA is codifying the redesignation through a revision to the FIP currently in place for the Kalispel Indian Reservation. *See* 40 CFR 49.10191–49.10220. This FIP will be implemented by the EPA unless or until it is replaced by a TIP. To ensure transparency, the EPA is also making a clarifying revision to the Washington State Implementation Plan at 40 CFR part 52, subpart WW, which would inform any party interested in Washington's significant deterioration of air quality provisions that the Kalispel Reservation is a Class I area for purposes of prevention of significant deterioration of air quality.

#### **IV. Statutory and Executive Order Reviews**

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:*

###### *Improving Regulation and Regulatory Review*

This action is not a “significant regulatory action” under the terms of the Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO, and was not submitted to the Office of Management and Budget (OMB) for review.

##### *B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

##### *C. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We are not proposing to promulgate any new paperwork requirements (*e.g.*, monitoring, reporting, record keeping) as part of this action. The regulation at 40 CFR 49.10198 incorporates by reference the Federal PSD program promulgated at 40 CFR 52.21. The OMB has previously approved the information collection requirements contained in the existing regulations (40 CFR 52.21) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060-0003, EPA ICR number 1230.32.

##### *D. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement*

###### *Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a

significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of this final action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. As stated in Section II, this action will not impose any new requirements on small entities. This action will redesignate to Class I only those lands within the exterior boundaries of the Kalispel Indian Reservation under the CAA's PSD program. The PSD permitting requirements already apply on the Reservation as well as the surrounding area. In addition, the PSD permitting requirements only apply to the construction of new major stationary sources or major modifications to existing major stationary sources. Therefore, the EPA does not anticipate this action having a significant economic impact on a substantial number of small entities.

#### *E. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Nor does this action create additional requirements

beyond those already applicable under the existing PSD permitting requirements.

*F. Executive Order 13132: Federalism*

This action does not have Federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This action does not change the relationship between the states and the EPA regarding implementation of the PSD permitting requirements in the area. The EPA administers the PSD permitting requirements within the Kalispel Reservation. The States of Washington and Idaho administer the permitting requirements in the nearby areas.

*G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action has tribal implications. However, it will neither impose substantial direct compliance costs on Federally-recognized tribal governments, nor preempt tribal law. The EPA is finalizing this action in response to the Kalispel Tribe's proposal to redesignate the Kalispel Reservation from a Class II to a Class I area. Major stationary sources proposed to be constructed within the boundaries of the Kalispel Reservation will be required to demonstrate that the source does not contribute to an exceedance of the lower PSD increments for Class I areas. Nonetheless, pursuant to the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with tribal officials early in the process of developing this proposed action so that they could have meaningful and timely input into its development. The Kalispel Tribe submitted its proposal on May 11, 2017. Subsequent to receiving the submission, the EPA communicated and corresponded with the Tribe numerous times throughout the review process.

*H. Executive Order 13045: Protection of Children from Environmental Health & Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions

that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. Redesignation of the Kalispel Indian Reservation to Class I from Class II will reduce the allowable increase in ambient concentrations of various types of pollutants. The reduction of allowable increases in these pollutants can only be expected to better protect the health of tribal members, members of the surrounding communities, and especially children and asthmatics. *See* 78 FR 3086 (regarding the specific human health consequences of exposure to elevated levels of coarse and fine particles); 82 FR 34792 (regarding the specific human health consequences of exposure to elevated levels of nitrogen dioxide); 75 FR 35520 (regarding the specific human health consequences of exposure to elevated levels of sulfur dioxide).

*I. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*J. National Technology Transfer and Advancement Act*

This action does not involve technical standards. This action merely redesignates the Kalispel Reservation as a Class I area for the purposes of the PSD permitting requirements.

*K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). Prior to this proposal, the EPA reviewed population centers within and around the Kalispel



Indian Reservation to identify areas with environmental justice concerns. The results of this review are included in the docket for this action.

Redesignating the Kalispel Indian Reservation will not have an adverse human health or environmental effect on residents within the Reservation or in the surrounding community. On the contrary, by lowering the applicable PSD increments, the redesignation will be more protective of air quality. The following pollutants are subject to the increment requirement: Fine Particulate Matter (PM<sub>2.5</sub>), PM<sub>10</sub>, SO<sub>2</sub>, and Nitrogen Dioxide (NO<sub>2</sub>). Exposure to these pollutants is known to have a causal relationship with adverse health effects, such as premature mortality (PM<sub>2.5</sub>, PM<sub>10</sub>, SO<sub>2</sub>), exacerbation of asthma (NO<sub>2</sub> and SO<sub>2</sub>), and other respiratory effects (NO<sub>2</sub> and SO<sub>2</sub>). *See* 78 FR 3086, 82 FR 34792, and 75 FR 35520. Therefore, a reduction of the allowable concentrations of these pollutants in this area lowers the risk to the surrounding communities of adverse health effects.

#### *L. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

#### *M. Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

## **V. Statutory Authority**

The statutory authority for this proposed action is provided by sections 110, 301 and 164 of the CAA as amended (42 U.S.C. 7410, 7601, and 7474) and 40 CFR part 52.

**List of Subjects in 40 CFR Part 49**

Environmental protection, Administrative practice and procedure, Air pollution control, Indians, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 5, 2019.

Chris Hladick,  
Regional Administrator,  
Region 10.

For the reasons stated in the preamble, 40 CFR parts 49 and 52 are amended as follows:

**PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT**

1. The authority citation for Part 49 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart M—Implementation Plans for Tribes—Region X**

2. Revise § 49.10198 to read as follows:

**§ 49.10198 Permits to construct.**

(a) Permits to construct are required for new major stationary sources and major modifications to existing stationary sources pursuant to 40 CFR 52.21.

(b) In accordance with section 164 of the Clean Air Act and the provisions of 40 CFR 52.21(g), the original Kalispel Reservation, as established by Executive Order No. 1904, signed by President Woodrow Wilson on March 23, 1914, is designated as a Class I area for the purposes of prevention of significant deterioration of air quality.

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

3. The authority citation for Part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart WW—Washington**

4. Amend § 52.2497 by adding paragraph (d) to read as follows:

**§ 52.2497 Significant deterioration of air quality.**

\* \* \* \* \*

(d) The regulations at 40 CFR 49.10191 through 49.10220 contain the Federal Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington. The regulation at 40 CFR 49.10198(b) designates the original Kalispel Reservation, as established by Executive

Order No. 1904, signed by President Woodrow Wilson on March 23, 1914, as a Class I area for purposes of prevention of significant deterioration of air quality.

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